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SUPREME COURT, U. S.

In The

Supreme Court of the United States

October Term, 1968

No. [redacted] 208

EXCHANGE NATIONAL BANK OF CHICAGO,
Cross-Petitioner,

vs.

SIDNEY P. ABRAMSON, ALLIED REALTY OF ST. PAUL, INC., GERTRUDE BROWN, PHILLIP KITZER, SR., and HELEN KITZER, his wife, PHILLIP C. KITZER and HELEN KITZER, his wife,
Respondents.

REPLY BRIEF IN SUPPORT OF CROSS-PETITION FOR CERTIORARI

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This brief is filed by cross-petitioner, EXCHANGE NATIONAL BANK OF CHICAGO, in support of its cross-petition for certiorari, and in reply to the opposing brief of ALLIED REALTY OF ST. PAUL, INC. (hereinafter referred to as "respondent").

I.

Respondent argues that Canon 36 operates only against specific conduct of an attorney; "in contradistinction to Canons 6 and 37." (Respondent's brief, p. 6.)

We fail to see the claimed distinction. All of the Canons are directed to lawyers; all are intended to regulate the conduct of lawyers. The question for determination is whether there should be any hesitancy in going beyond the lawyer in order to dissipate the effects of the violation of a Canon.

In *United States v. Mahaney,* 27 F. Supp. 463 (1939) (discussed in our cross-petition at page 6), the Court granted an injunction to prevent the use of confidential information by a lawyer and also *by the client* who had engaged the services of the lawyer in violation of the Canons. The Court in *Mahaney* recognized that the Canons "are addressed to the conscience of every lawyer," but the Court issued an injunction against *both* the lawyer and his client in that case.

The *Mahaney* case involved violation of Canons 6, 36 and 37. All three Canons are directed to lawyers; none of the Canons contains express language authorizing an injunction against a non-lawyer. *Mahaney* is, therefore, clear authority in support of the Court's power to vindicate Canons of Ethics by relief that extends beyond the lawyer himself. Were the rule otherwise, would not the Canons be rendered almost meaningless?

II.

Respondent suggests that the full relief sought by cross-petitioner would "immunize" it from "all attempts to assert claims against it arising out of or connected with the transactions involved in the criminal proceedings"; would "provide a windfall" to cross-petitioner; and would "suppress the truth about the allegations in the complaint." (Respondent's brief, pp. 7, 9, 12.)

Such suggestions border on the preposterous. We clearly stated in our cross-petition (at pages 6-7) that we sought to disqualify only material handed on to others by a lawyer in violation of the Canon, but that the same material could be used if gained from an unprohibited source.

Respondent has represented to this Court (at page 5 of Respondent's brief) that respondent "does not and never has relied on Mr. Abramson as a source of information in this suit." If this be true, we fail to understand how the suppression of any evidence obtained by Abramson and handed on

by him can immunize cross-petitioner from claims or interfere with the search for truth.

What the broadened relief sought by cross-petitioner *would* do would be simply to prevent the use against cross-petitioner, by anyone, of any of the fruits of Abramson's conduct which violated Canon 36. Such additional relief is plainly warranted if Canon 36 is to remain meaningful and effective.

In this connection, perhaps the clearest example of the ineffectiveness of the limited order below is the Court's refusal to strike the amended complaint. The amended complaint was admittedly based on the information developed during the criminal trial in which Abramson served as assistant prosecutor. The Court of Appeals below actually stated that there was "no reasonable basis" for depriving respondent "of the *benefit* of any pleadings which Mr. Abramson may have prepared." (Cr.-Pet. 18; emphasis added.) Abramson obviously drew upon and selected from his background in the criminal case (he was, after all, retained for this very purpose by respondent); and the amended complaint was prepared by Abramson, signed by Abramson, offered to the Court by Abramson and filed by Abramson (R. 12, 33, 47-48; S.R. 21-22, 123-31). The amended complaint was thus prepared and filed in *clear* violation of Canon 36, and we see no reasonable basis for permitting respondent to enjoy the benefit of Abramson's violation of the Canon.

Is Abramson to be disqualified but his work product allowed to stand? Is respondent to be prevented from future employment of Abramson in continued violation of Canon 36, but allowed to enjoy the benefit of his past violations of the Canon?

The rule of law which respondent appears to be urging on this Court would run like this:

> If a lawyer violates Canon 36, he cannot continue to participate in the matter which constitutes his violation,

and his disqualification shall take effect from the moment when he gets caught. However, anything he does before he gets caught, anything he has successfully passed along to others, and any use he has made of his governmental position after his retirement therefrom, but before he was caught, shall be inviolate. Also, the law of agency—and the literal intendment of Rule 65 (d)—shall continue in effect in all matters, civil and criminal, except only in connection with the Canons of Ethics. Solely in that connection, shall the rule of law henceforth be that although a lawyer may not violate a Canon himself, he may deliver into other hands (even to other lawyers) the fruits of such violation. Such fruits are cleansed of any taint of violation of ethical principles or of law as soon as they reach others' hands —including information improperly gained by him, pleadings prohibited from being drafted by him, etc.

Such a rule of law should carry an additional *caveat* to any lawyer in government employ, to the effect that, upon retirement, he would be wise to deliver to others, as speedily as possible, all information, special knowledge, lists of documents, etc.—anything which he investigated or passed upon while in the public employ—since use thereof by him would be a violation of Canon 36 (when and after being caught, tried and found disqualified) whereas in other hands the use thereof is not only permissible but declared to have been restored to admissibility by having been handed over to someone else—anyone else.

Can it be seriously urged that such was the intent of those who proposed and those who adopted Canon 36? Of the Minnesota Supreme Court Justices who accepted it as a rule of law for Minnesota in 1955? Or of the American Bar Association which promulgated the Canon in the first place?

CONCLUSION

Support of the Canons of Ethics is a matter of the utmost importance for both bench and bar.

We believe that this case—in which a Canon was violated but the relief granted was so narrow and limited as to undermine the Canon—is a highly appropriate one for review by this Court on writ of certiorari.

We respectfully request that the cross-petition for a writ of certiorari be granted.

Respectfully submitted,

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